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IN THE

Supreme Court of the United States

October Term, 1949.

No. [redacted]104

JOHN IVAN VISIC,

Petitioner,

v.

FRANCIS J. H. DEVER, Officer in Charge, Miami Office, IMMIGRATION AND NATURALIZATION SERVICE (W. A. CARMICHAEL substituted in place of FRANCIS J. H. DEVER),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for a writ of certiorari to review the judgment hereinafter described of the United States Court of Appeals for the Fifth Circuit, which judgment was made and entered on March 31, 1950.

Proceedings and Opinions Below.

This is a habeas corpus proceeding brought in the United States District Court for the Southern District of Florida by petitioner herein, against Francis J. H. Dever, Officer in Charge, Miami Office, Immigration and Naturalization Service (W. A. Carmichael substituted in place of Francis J. H. Dever), respondent herein, for order to terminate deportation proceedings against petitioner herein. The material facts in the case may be found in the petition for writ of habeas corpus and respondent's answer in order

to show cause (R. 1-11). The petitioner is an alien, native and citizen of Yugoslavia, who during the period 1925 to 1948 entered the United States several times temporarily as a seaman. On September 8, 1948 he secured an immigration visa from the American Consul in Habana, Cuba, and on the same date arrived at the Port of Miami, Florida, and applied for admission for permanent residence. He was interrogated by the Immigrant Inspector of the United States and temporarily excluded from admission under Part 175.57, Title 8, Code of Federal Regulations, as a person whose entry is deemed prejudicial to the interests of the United States. Subsequently, the Attorney General made final the temporary order of exclusion and deportation and directed that the petitioner be excluded from the United States without a Board of Special Inquiry hearing under the aforesaid Part 175.57 (b). The petitioner thereupon commenced the present proceedings by filing on October 26, 1948, petition for writ of habeas corpus (R. 1, 2).

In said petition allegation was made that the said order of exclusion and deportation, which was issued by the Attorney General, was arbitrary and capricious in that petitioner was not given a fair hearing on his application for admission and that he was being illegally deprived of his liberty in violation of his rights under the Constitution and laws of the United States, and that the conduct and findings of the Immigration and Naturalization Service and of the Attorney General of the United States do not conform to the requirements of the statutes of the United States. Order to show cause was issued directed to respondent, who answered on November 8, 1948, that he had custody of the petitioner, an alien, for the purpose of executing the above order of the Attorney General of the United States that petitioner be excluded and deported from the United States (R. 1-11).

Petitioner filed a motion for better statement on November 12, 1948, complaining that respondent's return to order to show cause was insufficient in that it failed to

reveal the facts upon which the order of exclusion was based and moved the Court to order the respondent to attach to his return the documents and records of the proceedings had by the Immigration and Naturalization Service and to set out in his return the facts upon which the order of exclusion was predicated (R. 11, 12).

By order dated November 24, 1948 the Court granted petitioner's motion for better statement, finding that Part 175.57, *supra,* did not justify the Attorney General to order the petitioner's exclusion and deportation and that the Presidential Proclamation No. 2523 of November 14, 1941, required the order to be made by the Secretary of State. Respondent by motion of December 2, 1948 moved the Court for rehearing on petitioner's motion for better statement, pointing out that his compliance with the order of the Court granting the motion would require him to act in contravention and violation of Department of Justice Order No. 3229 of May 2, 1939, which forbids the disclosure of the official records of that Department without permission of the Attorney General or his assistants, which permission has been expressly refused in this case. Respondent alleged that the records in this case contained confidential information, the disclosure of which would imperil the national security and safety. Respondent therefore asked that the Court's order granting the motion be quashed as unreasonable and oppressive, and reiterated that the order of the Attorney General directing petitioner's exclusion and deportation was adequately supported by law (R. 12-15).

Writ of habeas corpus issued on December 4, 1948 and on December 7, 1948 final judgment and order was entered restraining respondent from deporting petitioner from the United States under the order of the Attorney General, and directing that petitioner be remanded into the custody of the respondent for consideration of his application for admission under procedure prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917 (Title 8, U. S. C., 152, 153), and that pending final determination

of his application for admission, petitioner be released under $500.00 bond. Respondent filed notice of appeal from the final judgment and order on January 27, 1949 and stated as points on which he intended to rely on his appeal the alleged errors of the District Court in entering its above orders dated November 24, 1948, December 4, 1948 and December 7, 1948. Respondent also pointed out that subsequent to the entry of the final order and judgment the official records of the Department of Justice relating to the Immigration proceedings had in petitioner's case were referred to the Secretary of State, who after consideration found that the admission of the petitioner to the United States would be prejudicial to the interests of the United States within the meaning of Parts 175.53 (a) and (k), Title 8, Code of Federal Regulations, and ordered that petitioner be excluded from admission to the United States (R. 16-23).

The principal question involved in said appeal was whether the petitioner was in lawful custody of the respondent under the order of exclusion and deportation issued by the Attorney General pursuant to Part 175.57, Title 8, Code of Federal Regulations for the control of persons entering and leaving the United States.

On March 31, 1950, the United States Court of Appeals for the Fifth Circuit, in rendering judgment in the above cause declared that "the order of the Court below is reversed and the cause is remanded with directions to discharge the writ of habeas corpus and remand the Petitioner therein to the custody of the Officer in Charge, Immigration and Naturalization Service, at the port of Miami" (R. 29). *Dever v. Visic,* 180 Fed. (2d) 924 (1950).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, U. S. C., and Section 5 (b) of Rule 38 of the Revised Rules of this Court, as amended.

Statement of the Matter Involved.

The main problem of the present case is whether a friendly alien, seeking admission to the United States as the holder of a valid immigration visa issued by an American consular officer after thorough investigation of the alien by the Department of State and its officers charged with the disposition of visa applications, may be excluded and deported from the United States by order of the Attorney General without legal or fair fact-finding procedure, especially without a hearing before a Board of Special Inquiry.

In October, 1948, the Attorney General of the United States denied petitioner a hearing before a Board of Special Inquiry and ordered his exclusion and deportation from the United States pursuant to the authority vested in him and contained in Part 175.53 and Part 175.57, Title 8, Code of Federal Regulations, on the ground that the petitioner was an alien whose entry would be prejudicial to the interests of the United States (R. 10). On October 26th, 1948, the petitioner applied to the District Court of the United States for the Southern District of Florida, Miami Division, for a writ of habeas corpus. In the course of the habeas corpus proceedings the respondent refused to produce the official records of the Department of Justice concerning petitioner's exclusion under Part 175.53 and Part 175.57, Title 8, Code of Federal Regulations, on the ground that such records were confidential and that their production was forbidden by Department of Justice order No. 3229 of May 2, 1939 (R. 14). On December 7th, 1948, the District Court entered and filed Final Judgment ordering that respondent be restrained from deporting petitioner from the United States under the exclusion proceedings had under the aforesaid Part 175.53 and Part 175.57, and that such proceedings be terminated forthwith. The District Court also ordered that petitioner be remanded into the custody of the respondent for consideration of peti-

tioner's application for admission to the United States in accordance with the procedure prescribed by Sections 16 and 17 of the Immigration Act of February 5, 1917 (8 U. S. C. 152, 153) and regulations made pursuant thereto (R. 16-18).

On January 27th, 1949, the respondent filed Notice of Appeal in the above cause to the United States Court of Appeals for the Fifth Circuit from the final judgment and order entered in this action on December 7th, 1948, by the United States District Court for the Southern District of Florida, Miami Division (R. 18). On March 13th, 1950, this cause was argued by the attorneys of the Appellant (now respondent) and Appellee (now petitioner). The Appellant, United States Immigration and Naturalization Service, contended that Part 175.57, Title 8, C. F. R., invests the Attorney General with authority to order, without any hearing, the exclusion of an alien. In its decision rendered on March 31, 1950, reversing the Judgment and Order of the Court below, the Circuit Court of Appeals stated that "this contention must be sustained in conformance with the holding in *United States ex rel. Ellen Knauff v. Shaughnessy,* 338 U. S. 737, which supervened the adjudication of this proceeding in the Court below" (R. 28, 29).

The Brief in support of this Petition explains why the fundamental issue involved in the present case was not definitely decided in the above-cited case of *Knauff v. Shaughnessy.* As the petitioner is not an enemy alien and is within the jurisdiction of the United States, important principles of the American Bill of Rights are involved in this case. It is recognized that under the laws of the United States no court of justice has authority to issue a decree ordering the Immigration and Naturalization Service to admit an alien into the United States as an immigrant for permanent residence. However, the cardinal issue involved in this case is whether the war powers of Congress under the Constitution can be so delegated to the President and his executive officers as to enable the Secretary of

State and the Attorney General to issue and enforce Federal Regulations that in effect suspend, in the case of immigrant aliens, the Constitutional guarantee of "due process of law", and likewise abrogate the requirements prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917, for the protection of immigrant aliens from arbitrary orders and other abuses of power on the part of the Immigration and Naturalization Service.

Questions Presented.

The basic issue presented in this case is whether an immigrant alien who is not an enemy of the United States is entitled to a fair hearing in proceedings that may result in the Attorney General's order for his exclusion and deportation from the United States, or whether the Attorney General in any special case may disregard the procedure for a hearing before a board of special inquiry as prescribed in sections 16 and 17 of the Immigration Act of February 5, 1917, as amended.

Specifically the issues are:

(1) Whether under the Constitution Congress can confer upon the President or any other executive officer of the Government, even in war-time or during the existence of the national emergency proclaimed by the President, power to issue or promulgate regulations, rules, or orders that in effect override or suspend constitutional limitations intended to safeguard the civil rights and liberties of persons within the jurisdiction of the United States?

(2) Whether an immigrant who has the status of a *friendly* alien, and who while in possession of a valid immigration visa arrives at a port of the United States, is entitled during wartime or the existence of the national emergency proclaimed by the President to invoke the due process clause of the Fifth Amendment for the protection of his liberty?

(3) Whether the constitutional requirement of "due process of law" is to be read into the Act of May 22, 1918, as amended by the Act of June 21, 1941, pursuant to which the President issued Proclamation 2523, which authorized the Secretary of State and the Attorney General to issue jointly regulations for the imposition of "restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941, or, as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require"?

(4) Whether the Secretary of State and the Attorney General, in the issuance and execution of Federal Regulations for the control of persons entering and leaving the United States, pursuant to said Acts of Congress, including Part 175.57, Title 8, of said Regulations, may disregard the fundamental principles that inhere in "due process of law", one of which is that no person shall be deprived of his liberty without reasonable opportunity to be heard in respect of the matters upon which that liberty depends?

(5) Whether Part 175.57 (b), Title 8, Code of Federal Regulations, which provides that "in any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in Part 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest", legally authorizes the Attorney General, during the war or the existence of the national emergency proclaimed by the President, to disregard the procedural requirements as to the hearing of the alien which are prescribed in sections 16 and 17 of the Immigration Act of February 5, 1917, as amended?

(6) Whether proceedings of the Immigration and Naturalization Service which may result in the issuance or approval by the Attorney General of an order for the exclusion and deportation of an alien from the United States are within the scope of the Federal Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1001 *et seq.*), which in section 5 (c) provides in part that "no officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings"?

(7) Whether the lack of legally *competent* evidence against the petitioner and the unfairness of denying him a hearing in conformity with constitutional and statutory requirements in the proceedings conducted by the Immigration and Naturalization Service which culminated in the Attorney General's order for his exclusion and deportation, required judicial review of such proceedings?

Reasons Why Certiorari Should Be Granted

(1) The United States Court of Appeals for the Fifth Circuit sustained the validity of the Attorney General's order for the exclusion and deportation of the petitioner who was denied a hearing by the Attorney General, with the concurrence of the Secretary of State, acting under the authority of Part 175.57 (b), Title 8, Code of Federal Regulations for the "Control of persons entering and leaving the United States pursuant to the Act of May 22, 1918, as amended" by the Act of June 21, 1941 ((55 Stat. 252, 22 U. S. C., section 223). By the 1941 amendment it was provided that the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the

national emergency proclaimed May 27, 1941. Pursuant to this Act of Congress the President on November 14, 1941, issued Proclamation 2523 (3 CFR, 1943, 270-272), which recited that the interests of the United States required the imposition of additional restrictions upon the entry and departure of persons from this country and authorized the promulgation of regulations jointly by the Secretary of State and the Attorney General. It was also provided that no alien should be permitted to enter the United States if it were found that such entry would be prejudicial to the interests of the United States. Said Part 175.57 (b) provides that "in any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in Part 175.53 on the basis of information of a confiidential nature, the disclosure of which would be prejudicial to the public interest." (Published 10 F. R. 8995, July 21, 1945). However, neither the said Acts of Congress nor the Proclamations of the President issued thereunder contained any provision delegating to the Secretary of State and/or the Attorney General authority to deny an immigrant alien arriving in the United States a hearing in any special case. As sections 16 and 17 of the Immigration Act of February 5, 1917 (39 Stat. 885-887; 8 U. S. C. 152, 153), provide for a hearing of the alien before a board of special inquiry and an appeal from the decision of that board, and as these statutory provisions were not repealed, suspended, revoked, or abrogated by the said Acts of Congress, the *question* whether the Secretary of State and the Attorney General had the *legislative war power* to issue said Part 175.57 (b), which in effect abrogates the said provisions of the Immigration Act of February 5, 1917, or to apply Part 175.57 (b) to the petitioner and other *friendly aliens* within the jurisdiction of the United States, has not been, but should be, settled by the Supreme Court.

(2) The *question* whether the Act of May 22, 1918, section 1, as amended by the Act of June 21, 1941, and the President's Proclamation 2523 issued thereunder on November 27, 1941, conferred upon the Attorney General *constitutional* authority to exercise *exclusive* and *final* jurisdiction in the proceedings culminating in his order for the exclusion and deportation of the petitioner has not been, but should be, settled by the Supreme Court.

(3) In *Sung v. McGrath,* 339 U. S. 33 (1950), the Supreme Court held that "deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity." The *question* whether "due process of law", in the sense that it means a hearing conformable to the requirements of the said Procedure Act is to be read into the said Act of June 21, 1941, from which the President derived his authority to impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the period of the "national emergency" proclaimed May 27, 1941, has not been, but should be, settled by the Supreme Court.

(4) In its decision in this case the Circuit Court of Appeals failed to recognize the status of the petitioner as a *friendly* alien as distinguished from *enemy* aliens, who being citizens or subjects of countries at war with the United States, cannot claim any civil right or liberty under the Constitution and laws of the United States. Thus the *question* whether the aforesaid Part 175.57 (b), Title 8, C. F. R., legally enables the Attorney General, in proceedings that may result in orders of exclusion and deportation, to deny fair hearings to the nationals of those countries with which the United States maintains peaceful and friendly relations upon the basis of valid treaties of friendship, commerce, navigation, or otherwise, has not been, but should be, settled by the Supreme Court.

(5) As the petitioner is a political refugee from Yugoslavia who loyally served on merchant ships of the United Nations during and since the war and arrived in the United States with a valid immigration visa, and as the enforcement of the Attorney General's order for his exclusion and deportation without a hearing would unjustly deprive him of his liberty and livelihood and jeopardize his safety in Yugoslavia (the only country to which he could be deported), the *question* whether such enforcement would constitute infliction of "cruel and unusual punishment" forbidden by Article VIII of the Amendments to the Constitution, has not been, but should be, settled by the Supreme Court.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

June 2, 1950.

Respectfully submitted,

JOHN IVAN VISIC,

By .....
Ralph C. Busser,
of Counsel for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petitioner has submitted a petition for a writ containing the required statements of facts concerning the proceedings below and the questions involved, also the conclusions of law why the writ should be granted.

That the questions involved are substantial in character and require the decision of the Supreme Court is shown in the preceding Petition under the headings: *"Questions presented"* and *"Reasons why Certiorari should be Granted"*, which are hereby adopted and made a part of this brief.

Following *"Statement of the case"*, this brief sets forth, first, *"Summary of the Argument"*, in which the legal Points involved in this case are epitomized. Then follows the legal *Argument*, point by point, quoting and citing authority where necessary and stating those facts appearing on the record which are pertinent to the questions involved.

The language of those statutes, proclamations, and regulations that are not quoted in the text of the Argument is annexed to the brief as Appendix 1.

The assignment of errors appears in the conclusion of the Argument on each of the following Points.

Statement of the Case.

As shown in the preceding Petition under the heading: "*Statement of the Matter Involved,*" which is hereby adopted and made a part of this Brief, the United States Court of Appeals for the Fifth Circuit in reversing the judgment of the Court below sustained the action of the Attorney General of the United States in issuing the order for petitioner's exclusion and deportation without a hearing on the ground that his admission would be prejudicial to the interests of the United States. The Attorney General's denial of a hearing was based upon subparagraph (b) of Part 175.57, Title 8, Code of Federal Regulations for the "Control of persons entering and leaving the United States pursuant to the Act of May 22, 1918, as amended." The Amendment of June 21, 1941 (55 Stat. 252, 22 U. S. C., sec. 22) provides that "when the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941", the President might impose additional restrictions on the entry or departure of aliens, and makes it unlawful—"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe." Acting under the authority of the President's Proclamation 2523 of November 14, 1941 (3 C. F. R. 1943, 270-272), the Secretary of State and the Attorney General issued jointly the aforesaid Code of Federal Regulations, Title 8, including Part 175.53 and Part 175.57. Opinion of court below is reported in *Dever v. Visic,* 180 Fed. (2d) 824 (1950).

Summary of the Argument.

POINT A—Under the Constitution Congress cannot confer upon the President or any other executive officer of the Government, in peace or in wartime, power to enact administrative laws or to issue regulations, directives, or orders, that in effect override or suspend constitutional limitations intended to safeguard the civil rights and liberties of persons within the jurisdiction of the United States. Therefore, Part 175.57 (b), Title 8, Code of Federal Regulations, which authorizes the Attorney General under certain circumstances to deny the immigrant alien a hearing, was illegally applied by him as authority for his order excluding and deporting the petitioner from the United States.

POINT B—As the petitioner, being a native citizen of Yugoslavia, has the status of a *friendly alien* and is within the jurisdiction of the United States, his civil rights and privileges under the Federal Constitution are not suspended or extinguished as in the case of *enemy aliens* during the continuance of war between the United States and the countries to which they owe allegiance or during the existence of the national emergency proclaimed by the President on the 27th of May, 1941.

POINT C—As the exclusion and deportation of an alien from the United States deprives him of his liberty, the constitutional requirement of "due process of law" must be read into the Act of May 22, 1918, section 1, as amended by the Act of June 21, 1941, pursuant to which Act of Congress the President on November 14, 1941, issued Proclamation 2523. This proclamation recited that the interests of the United States required the imposition of additional restrictions upon the entry into and departure of persons from the United States and authorized the issuance of regulations jointly by the Secretary of State and the Attorney General. Whereupon they included in the Code of Federal

Regulations, Title 8, Part 175.57, under which the petitioner was denied a hearing. "Due process of law" required a fair hearing by a board of special inquiry in order to determine the competency and credibility of the evidence used by the Attorney General as the basis of his order for the exclusion and deportation of the petitioner.

POINT D—In the case of aliens whose entry into the United States is held up or suspended by the Immigration and Naturalization Service sections 16 and 17 of the Immigration Act of February 5, 1917, as amended, provide for a hearing of the alien before a board of special inquiry and an appeal from the decision of that board. As these statutory provisions were not repealed, revoked, abrogated, or suspended by the Act of June 21, 1941, or any other Act of Congress, the procedure prescribed in said Immigration Act was illegally denied the petitioner by the Attorney General, whose order for his exclusion and deportation thereby became invalid.

POINT E—The Attorney General determined that the petitioner was excludable on the basis of information furnished by absent witness or witnesses not on oath and not available for cross-examination by the petitioner or his counsel. As the petitioner was denied a hearing, he had no opportunity to examine, refute, or test the credibility of such information or testimony against him. Under those circumstances such information was *incompetent* as legal evidence, so that its use in determining that the petitioner's admission would be prejudicial to the interests of the United States was a fundamental error of law. Such error of law and the unfairness of denying the petitioner a hearing in conformity with constitutional and statutory requirements invalidated the Attorney General's order for his exclusion and deportation from the United States.

ARGUMENT.

Point A.

Although Congress has under the Constitution power "to declare war" and "to make all laws which shall be necessary and proper for carrying into execution" such war power, the authority to enact administrative laws or to issue regulations, rules, and orders that in effect override or suspend constitutional limitations intended to safeguard civil rights and liberties, cannot be delegated to or exercised by the President or any of his executive officers.

It is well established that the war power of the United States does not remove constitutional limitations safeguarding essential liberties. *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398 at 426 (1933); *Hamilton v. Kentucky Distilleries Co.,* 251 U. S. 146, 156 (1919); *Ex parte Milligan,* 4 Wallace 2, 120-127 (1866).

> "Life, liberty, and property are placed under the protection of known and established principles which cannot be dispensed with either generally or specially; either by courts or executive officers, or by the legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings: in some, they must be judicial; in others, the Government may interfere directly and *ex parte;* but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs." *Story on Constitution,* 5th ed., sec. 1945. *Cooley, Constitutional Limitations,* 355.

"Wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived

of his liberty without due process of law." *In re Krajcirovic,* 87 F. Supp. 379, 382; 18 U. S. Law Week, 2309 (1949). *The only exception is in the case of enemy aliens,* the disposition of whom during a state of war "was entrusted to the President by Congress almost throughout the whole life of the nation." *Ludecke v. Watkins,* 335 U. S. 160 at 171, 172 (1948). Thus the war-time restrictions, especially with regard to the entry into and departure of aliens from the United States, were derived from the Alien Enemy Act of July 6, 1798, (1 Stat. 577, R. S. sec. 4067) as amended (40 Stat. 531, 50 U. S. C. sec. 21), and the Act of June 21, 1941, amending section 1 of the Act of May 22, 1918 (55 Stat. 252, 22 U. S. C. sec. 223).

The Supreme Court has developed as a cardinal canon of construction of statutes, the principle that all laws in derogation of liberty must be strictly construed, and has applied this principle freely, both in favor of citizen and alien. Moreover, even statutes making the action of immigration authorities in excluding aliens final, have been held by the Federal courts to contemplate finality on disputed questions of fact only, and to require such forms of hearing as constitute due process of law for administrative hearings. *Gegiow v. Uhl,* 239 U. S. 3 (1915); *Davies v. Manolis,* 179 Fed. 818, 822 (1910).

In view of the established principles of law above referred to, the Circuit Court of Appeals was in error in approving the order of the Attorney General for the exclusion and deportation of the petitioner without a hearing.

Point B.

Pursuant to the Act of Congress approved June 21, 1941, the President issued on November 14, 1941, Proclamation 2523 (3 C. F. R. 1943, 270-272). This proclamation recited that the interests of the United States required the imposition of additional restrictions upon the entry into and departure of persons from the United States, and authorized the promulgation of regulations jointly by the

Secretary of State and the Attorney General. As the hearing of the petitioner could have been held *in camera,* the application of Federal Regulation 175.57 (b), under which the petitioner was excluded and denied a hearing, was not a *necessary* exercise of the authority conferred by the Act of June 21, 1941, upon the President to impose additional "restrictions and prohibitions" "upon the departure of persons from and their entry into the United States."

As the petitioner has the status of a *friendly* alien, his civil rights and privileges under the Federal Constitution are not suspended or extinguished as in the case of *enemy* aliens during the continuance of war between the United States and the countries to which they owe allegiance or during the existence of the national emergency proclaimed by the President on the 27th of May, 1941. Therefore, the action of the Attorney General in ordering the exclusion and deportation of the petitioner without a hearing was not a *proper* exercise of the authority conferred upon the President by the Act of June 21, 1941. In the case of *Ludecke v. Watkins, supra,* the Supreme Court in its majority opinion took the view that the sole question open on habeas corpus was *whether the petitioner was in fact an alien enemy.*

Consequently in this case the Circuit Court of Appeals was in error in failing to apply the ruling of the Supreme Court in *Bridges v. Wixon,* 326 U. S. 135, 154 (1944), that with regard to the constitutional safeguards for the protection of aliens in deportation cases "meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Point C.

The Attorney General or any other executive officer of the United States, when executing the provisions of the Act of May 22, 1918, section 1, as amended by the Act of June 21, 1941, or of Part 175.57, Title 8, Code of Federal Regulations, cannot legally disregard the fundamental prin-

ciples that inhere in "due process of law", one of which is that no person shall be deprived of his liberty without a fair hearing in respect of matters upon which that liberty depends.

> "Indispensable requisites of a fair hearing are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the charges against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine witnesses against him; that he may have time and opportunity after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it." *Whitfield v. Hanges,* 222 F. 745 at 749 (1915).

The privilege of aliens to enter the United States must be exercised in accordance with the procedure prescribed by Congress if the appropriate legislation has been enacted. The statutory requirements applicable to this case are sections 16 and 17 of the Immigration Act of February 5, 1917, as amended, which provide for a hearing of the alien before a board of special inquiry, and the Federal Administrative Procedure Act of June 11, 1946, which in section 5 (c) (60 Stat. 237, 240, 5 U. S. C. sec. 1004 (c)) provides in part that "no officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings . . .".

According to the opinion of the Supreme Court in *Sung v. McGrath,* 339 U. S. 33, 41, 50, 51; 70 S. Ct. 445 (1950), the fundamental purpose of the above-quoted pro-

vision in section 5 (c) of the Administrative Procedure Act was

> "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge. . . . When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."

Accordingly it was held that the "Administrative Procedure Act, section 5, does cover deportation proceedings conducted by the Immigration Service." The same principle applies to the present case, as the petitioner was not accorded a hearing of any kind in the proceedings conducted by the Immigration Service which culminated in the Attorney General's order for his exclusion and deportation. Thus in the present case the judgment of the Circuit Court of Appeals was in conflict with the opinion of the Supreme Court in *Sung v. McGrath, supra,* which ruled that without a hearing of the alien

> "there would be no constitutional authority for deportation. The Constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."

As the exclusion and deportation of an alien deprives him of his liberty, the constitutional requirement of due process of law must be read into the Act of May 22, 1918, section 1, as amended by the Act of June 21, 1941. In the *Japanese Immigrant* case (*Yamataya v. Fisher*), 189 U. S. 86, 100, 101; 23 S. Ct. 611 (1903), the necessity of according administrative due process of law in deportation proceedings was read into the immigration law by the Supreme Court, although not expressed by Congress. Since that decision Congress has prescribed in sections 16 and 17 of the Immigration Act of February 5, 1917, the administra-

tive procedure to be used in proceedings involving the question of an immigrant alien's exclusion and deportation from the United States.

As the purpose of the Federal Administrative Procedure Act of June 11, 1946, was to provide procedural safeguards against arbitrary or unfair administrative action, and to insure the application of "due process of law" to every person subject to the jurisdiction of an administrative agency or department, the Circuit Court of Appeals was in error in sustaining the action of the Attorney General in ordering the exclusion and deportation of the petitioner without according him a hearing in conformity with the applicable requirements established in section 5 of the Administrative Procedure Act and in sections 16 and 17 of the Immigration Act of February 5, 1917, as amended.

Point D.

In seeking admission into the United States as an immigrant for permanent residence the petitioner does not contend that he may do so under any claim of right. Referring to the case of *Knauff v. Shaughnessy,* 338 U. S. 737 (decided January 16, 1950), no issue is taken with the opinion expressed by the Supreme Court that "admission of aliens to the United States is a privilege granted by the sovereign United States Government only upon such terms as the United States shall prescribe," that "it must be exercised in accordance with the procedure which the United States provides", and that "whatever the procedure authorized by Congress is, is due process as far as an alien denied entry is concerned."

The procedure concerning the exclusion of aliens from the United States is statutory. The pertinent provisions are contained in sections 16 and 17 of the Immigration Act of February 5, 1917, as amended (39 Stat. 885-887; 8 U. S. C. 152, 153).

Those provisions of section 16 applicable to this case read:

". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry . . . Said inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence." • • •

"Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal."

Referring to section 17 of the Immigration Act of 1917, the applicable provision reads:

"Such boards (of special inquiry) shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or

any dissenting member of the said board may appeal through the commissioner of immigration and naturalization at the port of arrival and the Commissioner of Immigration and Naturalization to the Attorney General, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of immigration and naturalization at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General."

In the present case the above-mentioned statutory mode of procedure (except the examination of the petitioner by the immigrant inspector at the Port of Miami) was entirely disregarded. Upon his arrival at the port of Miami the petitioner was interrogated by the Immigrant Inspector. He was then incarcerated in the county jail, Dade County, Florida, by the Immigration authorities, who advised him that he was temporarily excluded from admission to the United States as "a person whose entry is deemed prejudicial to the interests of the United States." The petitioner was subsequently advised that the Attorney General had ordered his exclusion from the United States without a Board of Special Inquiry hearing and that this action was taken under the provisions of Title 8, Code of Federal Regulations, Part 175.57. The petitioner was also advised by the Immigration authorities that his deportation was ordered on the first available transportation (R. 4, 5).

The above-mentioned interrogation by the Immigrant Inspector cannot be considered as a "hearing", as the petitioner was not represented by counsel, had no oppor-

tunity to learn the alleged evidence against him or to refute it, nor to detect and correct untrue and slanderous statements that may have been made against him.

Referring to Part 175.57, Title 8, Code of Federal Regulations for the "Control of persons entering and leaving the United States pursuant to the Act of May 22, 1918, as amended" by the Act of June 21, 1941, it is provided in subparagraph (b) of Part 175.57 that "in any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in Part 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

Part 175.53 of the Code of Federal Regulations sets forth the categories of aliens whose entry shall be deemed prejudicial to the United States.

Although the petitioner has not been definitely informed as to the evidence upon which was based the Attorney General's order of exclusion and deportation, he believes that the order was based solely upon an unsubstantiated letter alleging his participation in communistic activities (R. 5). Subsection (a) of Part 175.53 terms prejudicial the entry of aliens who belong to one of the classes specified in the Act of October 16, 1918, as amended. That Act was further amended by the Act of May 25, 1948 (Chap. 338—Public Law 552 of 1948) by inserting the following clause immediately after the clause "Aliens who are anarchists;": "or aliens who the Attorney General knows or has reason to believe seek to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States". Therefore it is assumed that the Attorney General determined that the petitioner was excludable under the last-mentioned category included in subsection (a) of Part 175.53, Title 8, Code of Federal Regulations.

However, no Act of Congress has repealed, revoked, abrogated, or suspended the requirements as to hearings of immigrant aliens prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917, or has substituted therefor another mode of procedure. Consequently, that is the only "procedure authorized by Congress" which applied to the petitioner when he was detained by the Immigration authorities at the port of Miami.

As defined in the standard Law Dictionaries, *abrogation* is the destruction or annulment of a law, by an act of the legislative power, by constitutional authority, or by usage. *None can abrogate but those who have the power to make.* Therefore, in issuing the Code of Federal Regulations for the control of persons entering and leaving the United States the Secretary of State and the Attorney General had no power to abrogate or suspend the procedure for hearings of immigrant aliens prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917.

> In the absence of an explicit congressional grant to the Attorney General of the United States of arbitrary power such as that of excluding and deporting an immigrant alien without a hearing, it cannot be implied. *Knauff, United States ex rel. v. McGrath,* 18 L. W. 2466 (March 28, 1950).

Although the Act of May 22, 1918 (22 U. S. C. 223) authorized the President to prescribe "reasonable rules and regulations" for the control of persons entering and leaving the United States, neither that Act nor the amending Act of June 21, 1941, authorized the President or any other executive officer of the Government to disregard the procedure prescribed in Sections 16 and 17 of the Immigration Act of 1917, or to substitute therefor an arbitrary procedure such as that specified in Part 175.57 (b) of the Federal Regulations aforesaid.

Therefore, the Circuit Court of Appeals was in error in holding that Part 175.57, Title 8, Code of Federal Regu-

lations, invested the Attorney General with authority to order, without a hearing, the exclusion and deportation of the petitioner from the United States.

Point E.

In proceedings conducted by the Immigration and Naturalization Service that may result in an immigrant alien's exclusion from entry and his deportation from the United States the Attorney General is required under the Constitution and applicable laws of the United States to accord such alien a fair hearing, which shall include the application of the general rules of evidence necessary to protect the interests of the alien and afford him due process of law.

When charges are made against a person which lead to his arrest and place his life or liberty in jeopardy he has the right, under the Federal Constitution, to be confronted by the accusing witness if such witness is available.

> Hearsay, accusations without witnesses produced, and declarations of absent witnesses not on oath, are examples of *incompetent* evidence. Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following:—*first,* that the person making such declarations is not on oath; and, *secondly,* because the person against whom it operates has no opportunity of cross-examination. 1 Greenleaf on Evidence (16th ed.), secs. 98,99.

In *Bridges v. Wixon,* 326 U. S. 135 at 154 (1944) Mr. Justice Douglas said:

> "It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet, as was aptly stated in Interstate Commerce Commission v. Louisville & Nashville Ry. Co., 227 U. S. 88 at 93 (1912), 'the more liberal the practice in admitting testimony, the more imperative

the obligation to preserve the essential rules of evidence by which rights are asserted or defended.' "

Even as regards matters that may be judicially noticed, without formal proof, the matter relied on must be specifically referred to at the hearing, and produced, so that the immigrant may know what is relied upon to exclude him, and can meet it by proof.

According to the information received by the petitioner, "his exclusion and deportation is based solely upon an unsubstantiated letter alleging his participation in communistic activities" (R. 5). An order of deportation in the absence of *competent* adverse evidence against the alien, is a fundamental error of law which renders the determination of the Immigration Service reviewable by the Federal courts. *Gegiow v. Uhl,* 239 U. S. 3 (1915); *Davies v. Manolis,* 179 F. 818 at 822 (1910). Such error of law as well as the unfairness of denying the petitioner a hearing in conformity with constitutional and statutory requirements in judicial or administrative proceedings, have rendered invalid and legally ineffective the Attorney General's order for the exclusion and deportation of the petitioner. Therefore the United States Court of Appeals for the Fifth Circuit was in error in approving the Attorney General's order and in reversing the judgment of the United States District Court for the Southern District of Florida in this case.

The exercise of humanity in the administration of justice has again been asserted by the Supreme Court in recent cases. For example, in *Sung v. McGrath,* 339 U. S. 33 at 50 (1950) Mr. Justice Jackson said: "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." In *Bridges v. Wixon,* 326 U. S. 135, 154, 155 (1945) Mr. Justice Murphy in his concurring opinion stated certain circumstances in

which deportation would constitute *cruel punishment* of the alien not justified by the charges against him or by the evidence which caused the Attorney General to approve the order of deportation:—

> "The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation." . . . "*Deportation, with all its grave consequences, should not be sanctioned on weak and unconvincing proof of a real and imminent threat to our national security.*" (Emphasis supplied.)

In view of the petitioner's faithful and dangerous service on merchant ships operating for the United States and its Allies during the war, he has not only demonstrated his devotion to the common cause of the United Nations, but has on various occasious openly declared his attachment to American democratic principles and institutions and manifested his opposition to the present communist regime of Yugoslavia (R. 3-5). The petitioner has also faithfully complied with all the requirements of the immigration laws and regulations for the purpose of obtaining admission into the United States for permanent residence. Otherwise he would never have received the required immigration visa from the American Consul at Habana, Cuba, in September, 1948, after being thoroughly investigated by the Department of State (R. 4). In this and other actions, evidence of which appears in the records of the Department of State at Washington and of the American Embassy (Consular Section) at Habana, the petitioner has definitely severed his political ties and allegiance to Yugoslavia since

its Government has become communist and totalitarian (R. 5). Therefore he now has the status of a political refugee in the United States.

As the petitioner has never resided in any countries except Yugoslavia and the United States, the execution of the Attorney General's order of exclusion and deportation would result in his being deported to Yugoslavia. In all probability, this would lead to his arrest and severe punishment by the communist authorities upon charges of treason or disloyalty, especially in view of his refusal or failure to return after the war to his former service in the Yugoslav merchant marine (R. 3). Thus the enforcement of the Attorney General's order would not only deprive the petitioner of his liberty and livelihood, but also deliver him to the same tragic fate that has already befallen many Yugoslavs whose political convictions and activities and failure to escape from Yugoslavia exposed them to the persecution and vengeance of its despotic, communist government.

Conclusion.

A writ of certiorari to the United States Court of Appeal for the Fifth Circuit should issue.

Respectfully submitted,

RALPH C. BUSSER,
Of Counsel for Petitioner.

June 2, 1950.

APPENDIX.

Act of June 21, 1941.

[Shorter citations of other statutes are set forth verbatim at the proper places in the Argument.]

The Act of May 22, 1918, section 1, as amended by the Act of June 21, 1941, Title 22, U. S. C., section 223:

"223. *War-time restrictions generally.* When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by sections 223-226 of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful (As amended June 21, 1941, c. 210, section 1, 55 Stat. 252.)

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;"

• • •

Act of May 25, 1948.

CHAPTER 338—PUBLIC LAW 552 OF 1948
(1878)

An Act to amend the immigration laws to deny admission to the United States of aliens who may be coming here for the purpose of engaging in activities which will endanger the public safety of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 1 (a) of the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U. S. C. 137), is further amended by inserting the following clause immediately after the clause "Aliens who are anarchists;": "or aliens who the Attorney General knows or has reason to believe seek to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States."

Approved May 25, 1948.

Proclamation No. 2523.

Control of Persons Entering and Leaving the United States

By the President of the United States of America

A PROCLAMATION

Whereas the act of Congress approved May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (Public Law 114, 77th Congress, chap. 210, 1st sess., 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941, or, as to aliens, whenever there exists a state of war between or among two or more States, and when I find that the interests of the United States so require; and

Whereas the national emergency proclaimed by me on May 27, 1941, is still existing; and

Whereas there unhappily exists a state of war between or among two or more states and open hostilities engage a large part of the Eastern Hemisphere; and

Whereas the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States:

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me as set forth above, do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibi-

tions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

(1) After the effective date of the rules and regulations hereinafter authorized, no citizen of the United States or person who owes allegiance to the United States shall depart from or enter, or attempt to depart from or enter, the United States, including the Panama Canal Zone, the Commonwealth of the Philippines, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport issued by the Secretary of State or, under his authority, by a diplomatic or consular officer of the United States, or the United States High Commissioner to the Philippine Islands, or the chief executive of Hawaii, of Puerto Rico, of the Virgin Islands, of American Samoa, or of Guam, or unless he comes within the provisions of such exceptions or fulfills such conditions as may be prescribed in rules and regulations which the Secretary of State is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed. Seamen are included in the classes of persons to whom this paragraph applies.

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations, and orders herein prescribed; nor shall any

alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit-issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

(4) No person shall depart from or enter, or attempt to depart from or enter, the United States without submitting for inspection, if required to do so, all documents, articles, or other things which are being removed from or brought into the United States upon or in connection with such person's departure or entry, which are hereby made subject to official inspection under rules and regulations which the Secretary of State in the cases of citizens, and

the Secretary of State with the concurrence of the Attorney General in the cases of aliens, is hereby authorized to prescribe.

(5) A permit to enter issued to an alien seaman employed on a vessel arriving at a port in the United States from a foreign port shall be conditional and shall entitle him to enter only in a case of reasonable necessity in which the immigration authorities are satisfied that such entry would not be contrary to the interests of the United States; but this shall not be deemed to supersede the provisions of Executive Order 8429, dated June 5, 1940 concerning the documentation of seamen.

(6) The period of validity of a permit to enter or a permit to depart, issued to an alien, may be terminated by the permit-issuing authority or by the Secretary of State at any time prior to the entry or departure of the alien, provided the permit-issuing authority or the Secretary of State is satisfied that the entry or departure of the alien would be prejudicial to the interests of the United States which it was the purpose of the above-mentioned acts to safeguard.

(7) Except as provided herein or by rules and regulations prescribed hereunder, the provisions of this proclamation and the rules and regulations issued in pursuance hereof shall be in addition to, and shall not be held to repeal, modify, suspend, or supersede any proclamation, rule, regulation, or order heretofore issued and now in effect under the general statutes relating to the immigration of aliens into the United States; and compliance with the provisions of this proclamation or of any rule or regulation which may hereafter be issued in pursuance of the act of May 22, 1918, as amended by the act of June 21, 1941, shall not be considered as exempting any individual from the duty of complying with the provisions of any statute, proclamation, rule, regulation, or order heretofore issued and now in effect.

(8) I direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order promulgated in pursuance hereof. They shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws the utmost diligence in preventing violations of the act of May 22, 1918, as amended by the Act of June 21, 1941, and in bringing to trial and punishment any persons who shall have violated any provisions of such acts.

(9) Paragraph 6, part 1, of Executive Order 8766, issued June 3, 1941, is hereby superseded by the provisions of this proclamation and such regulations as may be prescribed hereunder.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this 14th day of November in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

(Seal)

By the President: FRANKLIN D. ROOSEVELT.

CORDELL HULL,
Secretary of State.

Proclamation No. 2714.

(12 F. R. 1)

CESSATION OF HOSTILITIES OF WORLD WAR II.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

(Seal)

By the President: HARRY S. TRUMAN.

JAMES F. BYRNES,
The Secretary of State.

Code of Federal Regulations.

§ 175.53 AND § 175.57 OF TITLE 8—ALIENS AND NATIONALITY.

§ 175.53 Classes of aliens whose entry is deemed to be prejudicial to the public interest. The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of these regulations:

(a) Any alien who belongs to one of the classes specified in the Act of October 16, 1918, as amended. (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U. S. C. 137)

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive Order issued in pursuance of the act of Congress approved June 20, 1941 (ch. 209, 55 Stat. 252; 22 U. S. C., Supp. 228, 229).

(i) Any alien enemy: *Provided,* That this excluding provision shall not apply to aliens who

(1) Present valid permits to enter issued on or after November 14, 1941, or are exempted under these regulations from presenting permits to enter and are found to be otherwise admissible under these regulations; or

(2) Before September 1, 1939, became and still are citizens or subjects of any foreign country at war with Japan and who have not, since September 1, 1939, and before May 8, 1945, returned to any enemy or enemy-controlled territory; or

(3) Are under 14 years of age; or

(4) Are excepted from the excluding provisions of this subsection in the discretion of the permit-issuing authority or of the Secretary of State.

(j) Any alien found to be, or charged with being, a war criminal by the appropriate authorities of the United States or one of its co-belligerents, or an alien who has been guilty of, or who has advocated or acquiesced in activities or conduct contrary to civilization and human

decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the Act of June 21, 1941 (55 Stat. 252) to safeguard.

§ 175.57. Entry not permitted in special cases. (a) Any alien, even though in possession of a permit to enter, or exempted under these regulations from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his Department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be, excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of

special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 104

JOHN IVAN VISIC, PETITIONER

v.

FRANCIS J. H. DEVER, OFFICER IN CHARGE, MIAMI OFFICE, IMMIGRATION AND NATURALIZATION SERVICE (W. A. CARMICHAEL SUBSTITUTED IN PLACE OF FRANCIS J. H. DEVER)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a national of Yugoslavia (R. 3), arrived at the port of Miami, Florida, on September 8, 1948, in possession of an immigration visa issued by the American Consul in Havana, Cuba, seeking entry into the United States as a permanent resident (R. 4).[1] Upon examination by an immi-

[1] A seaman by occupation, petitioner had twice previously been in the United States on prolonged temporary visits. In August 1943, during the second of these visits, he was arrested by the immigration authorities and taken to Ellis Island for deportation on the ground that he was in the United States illegally. During the pendency of the proceedings, however,

grant inspector, he was temporarily excluded, pursuant to 8 C. F. R. 175.53 and 175.57, as an alien whose entry was deemed to be prejudicial to the interests of the United States (R. 2, 4, 9–10). Subsequently, the Attorney General, acting pursuant to the authority conferred on him by the same regulations, on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, directed that petitioner be permanently excluded, without a hearing before a board of special inquiry, as an alien whose entry into this country would be prejudicial to the interests of the United States (R. 2, 4, 10). Petitioner was notified of this action by the Attorney General on October 15, 1948 (R. 2).

On October 26, 1948, petitioner filed in the District Court for the Southern District of Florida a petition for a writ of habeas corpus (R. 1–8), challenging the legality of his detention and the lawfulness of the procedure whereby he was ordered permanently excluded. A rule to show cause issued (R. 8–9), and respondent filed a return setting forth the Attorney General's order of permanent exclusion (R. 9–11). Following other pleadings which it is unnecessary to relate in detail (see R. 11–15), the District Court (Hol-

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and in anticipation of deportation, he volunteered, with the consent of the immigration authorities, for duty as a seaman on a merchant vessel in the service of the United Nations. (R. 3, 27.)

land, D. J.), on December 4, 1948, issued a writ of habeas corpus (R. 16). Thereafter, on December 7, 1948, the court entered an order (R. 16–18) restraining respondent from carrying out the order of permanent exclusion issued under the authority of the above-cited regulations, and remanding petitioner to the custody of respondent "for consideration of petitioner's application for admission to the United States in accordance with the procedure prescribed by Section 16 and Section 17 of the Immigration Act of February 5, 1917 (8 U. S. C. 152 and 153) and regulations made pursuant thereto" (R. 17).[2]

Respondent appealed from this order to the Court of Appeals for the Fifth Circuit, which, on March 31, 1950, reversed the order of the District Court on the authority of *Knauff* v. *Shaughnessy,* 338 U. S. 537 (decided January 16, 1950, while the instant case was pending on appeal), and remanded the cause to the District Court with directions to discharge the writ of habeas corpus and remand petitioner to custody for permanent exclusion and deportation in accordance with the Attorney General's order (R. 28–29). The petition for a writ of certiorari seeks review of this judgment.

[2] Sections 16 and 17 of the Immigration Act of 1917 set forth the normal procedure to be followed in cases where the immigration authorities challenge the eligibility of an alien applicant for admission to enter the country. The key feature of this procedure is the hearing before a board of special inquiry.

1. As recognized by the Court of Appeals, this case is controlled by *Knauff* v. *Shaughnessy, supra,* which sustained the validity of an order of the Attorney General, based on the same regulations as those here involved, permanently excluding, on the basis of confidential information, and without a hearing before a board of special inquiry, an alien whose entry was deemed to be prejudicial to the interests of the United States. Contrary to petitioner's suggestion (Pet. 11, 18, 19), his status as a "friendly" alien is without relevance. Neither the statute [3] nor the Presidential Proclamation [4] on which the perti-

[3] "When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For *any alien* to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *" [italics supplied] (Act of May 22, 1918, c. 81, § 1, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U. S. C. 223)).

[4] "(3) After the effective date of the rules and regulations hereinafter authorized, *no alien* shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of

nent regulations are based distinguishes between "enemy" and "friendly" aliens. And, under the regulations, "[a]ny alien enemy" constitutes but one of the eleven categories of aliens whose entry is deemed prejudicial to the interests of the United States (8 C. F. R. 175.53(a)–(k)). Nothing in the *Knauff* opinion lends support to the distinction which petitioner makes; in fact, though Mrs. Knauff was born in Germany, she acquired Czechoslovakian citizenship by marriage, and at the time of her exclusion was, or claimed to be, stateless (see p. 3 of our brief in the *Knauff* case, No. 54, O. T. 1949).

2. Petitioner's contention (Pet. 9, 11, 20–22), made for the first time in this Court, that the procedure whereby he was excluded was invalid for the reason that it failed to comply with the separation of functions provisions of Section 5 (c) of the Administrative Procedure Act (5 U. S. C. 1004 (c)), is plainly without merit.

State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

"*No alien* shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General." [Italics added.] (Proclamation No. 2523 of November 14, 1941 (6 F. R. 5821–5823), paragraph (3).)

Section 5 in its entirety applies, by its terms, only to cases of "adjudication required by statute to be determined on the record after opportunity for an agency hearing." See *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 48. No hearing at all was held in this case, and none was required, as held in the *Knauff* decision. Section 5 was and is, therefore, obviously inapplicable.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 104.

JOHN IVAN VISIC,

Petitioner,

v.

FRANCIS J. H. DEVER, Officer in Charge, Miami Office, IMMIGRATION AND NATURALIZATION SERVICE (JOSEPH SAVORETTI substituted in place of FRANCIS J. H. DEVER),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY

To Memorandum for the Respondent in Opposition.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1949.

No. 104.

JOHN IVAN VISIC,

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v.

FRANCIS J. H. DEVER, OFFICER IN CHARGE, MIAMI OFFICE, IMMIGRATION AND NATURALIZATION SERVICE (JOSEPH SAVORETTI SUBSTITUTED IN PLACE OF FRANCIS J. H. DEVER).

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY

To Memorandum for the Respondent in Opposition.

FIRST PART.

On page 4 of respondent's brief it is stated:

> "Contrary to petitioner's suggestion (Pet. 11, 18, 19), his status as a 'friendly' alien is without relevance. Neither the statute nor the Presidential proclamation on which the pertinent regulations are based distinguishes between 'enemy' and 'friendly' aliens."

As shown in the petitioner's brief (pp. 18, 19), this Court has distinguished between "enemy" and "friendly" aliens when the Fifth Amendment to the Constitution was

invoked to protect aliens against deportation without a full and fair hearing.

As the disposition of enemy aliens "was entrusted to the President by Congress almost throughout the whole life of the nation", it is conceivable that an enemy alien cannot legally demand a hearing when his admission into the United States is challenged by the Immigration authorities at the port of entry. On the other hand, the Constitutional guarantee of due process of law was extended to immigrant aliens by Sections 16 and 17 of the Immigration Act of February 5, 1917, requiring a hearing before a Board of Special Inquiry, when his admission was so challenged. Consequently, so long as these statutory provisions remain in force an immigrant alien who is not legally an enemy of the United States cannot, according to existing law, be excluded and deported without a hearing as prescribed therein.

The Act of June 21, 1941, amending Section 1 of the Act of May 22, 1918 (55 Stat. 252, 22 U. S. C. sec. 223) provided that the President might, upon finding that the interests of the United States required it, impose additional restrictions and prohibitions on the entry into and departure of persons from the United States during the national emergency proclaimed May 27, 1941. On November 14, 1941, the President issued Proclamation 2523 (3 CFR, 1943, 270-272), which provides that—

> "No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."

The pertinent Federal Regulations prescribed by them are § 175.53 and § 175.57 of Title 8—Aliens and Nationality (App. to Pet. 39-42).

The Act of May 25, 1948, amends Section 1 of the Act of October 16, 1918, by adding to the classes of excludable immigrants, "aliens who the Attorney General *knows or has reason to believe* seek to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States" (Pet. App. 32). (Italics supplied.) Federal Regulation § 175.53 includes among the categories of persons whose entry "shall be deemed prejudicial to the interests of the United States":

> "(a) Any alien who belongs to one of the classes specified in the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U. S. C. 137)."

The order for the exclusion and deportation of the petitioner without a hearing was issued under subparagraph (b) of Regulation § 175.57, which provides that—

> "In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

It is indisputable that neither the President by proclamation, nor the Secretary of State and Attorney General by the issuance of Federal regulations, has the power under the Constitution to revoke, suspend, or abrogate any provision of an Act of Congress. Therefore the petitioner raised in his petition the basic question whether the said Act of June 21, 1941, or the said Act of October 16, 1918, as amended by the Act of May 25, 1948, abrogated, or suspended during the war or national emergency, the procedure for a hearing prescribed in Sections 16 and 17 of the Immigration Act of 1917. As this procedure was not *ex-*

pressly abrogated or suspended by any of the above-mentioned Acts of Congress, *could it have been abrogated by implication?*

In a case decided on March 28, 1950, by the United States Court of Appeals for the Second Circuit, involving the question of an immigrant alien's exclusion without a hearing, Judge Frank said:

> "It may be—although we need not and do not here so decide—that Congress could constitutionally empower an official to use his sheer personal whim or caprice in dealing with aliens (like relator) stopped at the border. But, *absent an explicit Congressional grant of such arbitrary power, we think it cannot be implied.*" (Italics supplied.) *Knauff, United States ex rel. v. McGrath,* 181 F. 2d 839, 842; 18 L. W. 2466.

Without hearing the petitioner and affording him opportunity to refute the charges against him (which could be done without disclosing the name of the informer) how could the Attorney General *"know or have reason to believe"* that the petitioner "seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States"?

Without a hearing, only by means of which the truth or falsity of the evidence could be fairly determined, (1) how could the Secretary of State be *reasonably* satisfied that the petitioner's "entry would be prejudicial to the interests of the United States"?, and (2) how could the Attorney General *reasonably* determine that the petitioner is excludable under the said Act of May 25, 1948, or under Federal Regulation 175.53, which prescribes the "Classes of aliens whose entry is deemed to be prejudicial to the public interest"?

Without a *reasonable* determination of the questions involved the action of the Attorney General in ordering the exclusion of the petitioner without a hearing, and the ac-

tion of the Secretary of State in concurring in that order, were quite arbitrary.

The good faith of these Government officers, in reaching their decision to exclude and deport the petitioner, is of course not in issue. However, the question to be considered is not whether the arbitrary power assumed by these executive officers is *likely* to be abused, but whether there is *possibility* of abuse. On evidence concealed from the petitioner, or on evidence never subjected to the test of a fair hearing, these executive officers have not the means of making a fair and impartial decision. Consequently, if there is no judicial review of their decision, they are the *final judges of their own powers.* What Government officials may legally do in the exercise of their functions is determined by law, and what they actually do should be scrutinized judicially in appropriate court proceedings on complaint of any one wronged by their action. According to the American constitutional system, *law is not what is done by Government officials but the measure of what ought to be done officially and how it ought to be done.*

As the petitioner is not an enemy of the United States, he is entitled to the protection of its Constitution and laws. Therefore he contends that the Attorney General's order of exclusion and deportation without a hearing cannot legally be enforced under Federal Regulation 175.57 (b), because that Regulation contravenes the procedure prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917, and disregards the Constitutional requirement of procedural due process of law.

SECOND PART.

In the respondent's brief it is contended that Section 5 (c) of the Administrative Procedure Act (5 U. S. C. 1004 (c) is not applicable to the petitioner because "no hearing at all was held in this case, and none was required, as held in the Knauff decision." In reply the petitioner refers to the IV part of the opinion delivered by Mr. Justice Jack-

son in *Wong Yang Sung v. McGrath,* 339 U. S. 33, 48-51, especially the following statement:

> "We think that the limitation to hearings 'required by statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; *not those held by compulsion.*" (Italics supplied.)

In the case of *Sung v. McGrath,* which concerned a *resident* alien, this Court decided that "without a hearing there would be no constitutional authortiy for deportation." As the protection of the Fifth Amendment may also be invoked by an alien whose admission into the United States is challenged at the port of entry, procedural due process of law would entitle him to "opportunity for an agency hearing" if there were no existing right to a hearing before a Board of Special Inquiry as prescribed in Sections 16 and 17 of the Immigration Act of February 5, 1917. In *The Japanese Immigrant Case,* 189 U. S. 86, 101 (1903), this Court stated:

> "In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of words used, will bring them into harmony with the Constitution."

Accordingly this Court decided in that case that a hearing must be provided at least for aliens who had not entered the United States clandestinely and who had been here some time even if illegally. In the present case the petitioner did not attempt to enter the United States clandestinely, as he came to Miami, Florida, with an immigration visa duly issued by the American Consul at Habana, Cuba (Pet. p. 2), and "had twice previously been in the United States on prolonged temporary visits." (Respondent's Mem. p. 1.)

In *Sung v. McGrath, supra,* this Court in its opinion stated that—

> "The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."

Therefore it is respectfully submitted that the formal requirements of the Administrative Procedure Act as to hearings and evidence, being based upon the constitutional requirement of procedural due process, are applicable to the petitioner, notwithstanding this Court's ruling in *United States ex rel. Knauff v. Shaughnessy,* 338 U. S. 537, that the Attorney General's action in pursuance of 8 CFR § 175.57 (b) was authorized by the Act of June 21, 1941, amending Section 1 of the Act of May 22, 1918 (22 U. S. C. sec. 223).

Section 7 (c) of the Administrative Procedure Act provides under *"Hearings"* that—

> "Every party shall have the right to present his case on defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

As to the right of judicial review and the scope of review Section 10 of the Administrative Procedure Act provides that "except in so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

> "(a) *Right of review.*—Any person suffering legal wrong because of any agency action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(e) *Scope of review*—So far as necessary to decision and where presented the reviewing court shall

decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. *It shall* (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and *set aside agency action,* findings, and conclusions *found to be* (1) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;* (2) *contrary to constitutional right,* power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) *without observance of procedure required by law:* . . ." (Italics supplied.)

As it appears from the record that the Attorney General's action in the present case was arbitrary, capricious, an abuse of discretion, and contrary to constitutional right, such so-called "agency action" becomes a legal nullity. Consequently the petitioner is entitled to judicial review on account of the legal wrong he is suffering from the Attorney General's arbitrary procedure in this case.

For the reasons stated in this reply brief and in the brief attached to the petition, a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should issue.

Respectfully submitted,

RALPH C. BUSSER,
Of Counsel for Petitioner.

July 31, 1950.